Nos. 2539, 2540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

Brief on Behalf of Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

R. P. HENSHALL,
Merchants National Bank Bldg., S. F.,

H. L. CLAYBERG,
JNO. B. CLAYBERG,
WELLES WHITMORE,
Pacific Building, San Francisco,
Solicitors for Appellee.

Filed this ..... day of January, A. D., 1915

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk

THE TEN BOSCH COMPANY, SAN FRANCISCO

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BRIEF ON BEHALF OF APPELLEE.

These are appeals from an order refusing to vacate an order granting an injunction *pendente lite* and refusing to dissolve such injunction.

Counsel for appellants have only filed and served one brief in the two cases and, for convenience of consideration, we shall do likewise.

It seems important to call the attention of the Court briefly to some particular parts of the statement of the case contained in appellants' brief, as follows:

The respective bills of complaint were filed in the District Court of the United States in and for the Southern District of California, in November, 1914, and upon the filing thereof an order to show cause was issued against the defendants therein, why injunctions, *pendente lite,* should not be issued as prayed for, and in the meantime the defendants were restrained until the decision on the hearing of the order to show cause. Upon such hearing, the Court directed the issuance of an injunction *pendente lite;* appellants filed with their motion to vacate such order and dissolve the injunction, the affidavits of Joseph K. Hutchinson, Thomas W. Pack and Stella Schuler.

The purpose of the bills of complaint was to procure an accounting of the moneys claimed to have been expended by Thomas W. Pack, one of the appellants, in the alleged annual representation of certain placer mining claims, described in the Bills of Complaint, and to enjoin the defendants named therein from taking any further steps toward a forfeiture of complainants' rights and interests in these placer claims until it could be determined how much, if any, money had been actually paid by Pack in such alleged annual representation of the claims. The complainants, by their bills, offered to pay the

defendants in said suits whatever amount the Court might decide had been expended by Pack for the purpose of annual representation.

The Positive Allegations of the Complaint Sustain the Injunctions.

The positive allegations in these complaints were so admirably summarized by Judge Bledsoe in his opinion rendered on the orders to show cause, that we will quote and utilize the same:

> "That the plaintiff in the year nineteen hundred and ten, in conjunction with the defendant, Pack, and certain other individuals mentioned, located and recorded one hundred and seventy-five certain placer mining claims, situate in the County of San Bernardino, State of California; that plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that during the month of September, in the year nineteen hundred and fourteen, the defendant herein caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the Sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred seventy-five (175) described placer mining claims heretofore referred to; That said notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same upon him, paid to the defendants or to the defendant Joseph K. Hutchinson for said defendants, the sum of

seven hundred dollars ($700) claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred twelve (1912), that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson; plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years nineteen hundred eleven (1911) and nineteen hundred and twelve (1912) or at any other time the sum of fifty-six hundred dollars ($5600) of which the said seven hundred dollars ($700) was the one-eighth part upon or for, the benefit of said placer mining claims, or at all; that at least twenty-eight hundred and thirty-six ($2836) was contributed by plaintiff and his co-locators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned, for the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912); plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, and the American Trona Company and the California Trona Company."

All these allegations are made positively in the complaints and each and all of them are supported by the positive affidavit of Henry E. Lee attached to the several complaints. True, the complaints contain many allegations made upon information and belief, which seems to be necessary to raise and try issues upon matters connected with, explaining and fortifying the positive allegations above quoted. Such

allegations, however, were not considered by Judge Bledsoe, as is shown by his opinion (Trans. p. 44).

Upon these positive allegations, positively verified, we base the validity of the orders appealed from.

Preventing Casting of Cloud upon Title.

These allegations clearly show that defendants therein are about to take such steps as would cast a cloud upon the title and interest of the respective complainants in the placer mining locations named in the bill. Judge Bledsoe so held and based such holding upon the authority of Pixley v. Huggins, 15 Cal. 128 (Trans. p. 47).

In that case Judge Field used the following language:

> "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed be required to offer evidence to defend a recovery? If such proof would be necessary the cloud would exist; if the proof would be unnecessary no shade would be cast by the presence of the deed."

Anything that has a tendency, even in the slightest degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is a cloud upon title. Whitney v. Port Huron, 88 Mich. 268.

"A cloud upon one's title is something which shows *prima facie* some right of a third person to it." Waterbury Savings Bank v. Lawler, 46 Conn.

243. "A cloud is said to be the semblance of a title, either legal or equitable, as a claim of an interest in lands, appearing in some legal form." Rigdon v. Shirk, 127 Ill. 411.

In McConnaughy v. Pennoyer, 43 Fed. 339, plaintiff brought suit to enjoin a sale of certain swamp land by the land commissioners of the State of Oregon, claimed by plaintiff as forfeited to him by the State under contracts. The Court says:

> "The defendants have the general and exclusive authority to dispose of the swamp lands of the State, including those which may have reverted thereto for delinquency under Section 9 of the Act of 1878. The plaintiff, to overcome the apparent legal title which the sale and conveyance of his land would vest in the defendant's grantee, would be obliged to resort to extrinsic evidence to show that this land had been duly bargained and sold to his grantor, and had not reverted to the State under Section 9 of the Act of 1878, and therefore the second sale was unauthorized and wrongful.
>
> "This constitutes a cloud on title within all the authorities."

So here, the respective complainants would be compelled to resort to extrinsic evidence to show that the pretended Notices of Forfeiture were not effective. Under Section 14260 of the C. C., such papers, after having been filed, become *prima facie* evidence that the respective co-owners have not contributed to the representation of the placer claims in question, as stated in said pretended Notices of Forfeiture.

The Supreme Court of California in the case of Lubbock v. McMann, 82 Cal. 226-230, says:

> "But though the sale of a homestead under execution conveys no title, it may create a cloud and involve the homestead claimant in litigation and will therefore be enjoined."

So we must conclude that the filing of copies of these pretended Notices of Forfeiture, together with affidavits of service, under Section 14260, C. C., would cast a cloud upon the respective complainants' title in and to the placer claims described in the several complaints.

No doubt but that equity has jurisdiction to *prevent* the casting of a cloud upon title. It is a well settled doctrine that inasmuch as a court of equity can *remove* clouds cast upon title, it has equal power to *prevent* a cloud being cast upon the title. This is axiomatic and should not require the citation of authorities. If a court can remove a cloud from a title, it certainly has power to prevent any cloud being cast thereon.

Pixley v. Huggins, 15 Cal. 128;
Palmer v. Boling, 8 Cal. 388;
Tibbetts v. Fore, 70 Cal. 243-47;
Mechanics Bank v. City of Kansas, 73 Mo. 555, 559;
Hare v. Carnall, 39 Ark. 196, 202;
Burnett v. Cincinnati, 3 Ohio 73, 88;
McConnaughy v. Pennoyer, 43 Fed. 339.

The bills of complaint might be sustained upon this theory alone. However, it is well established and, doubtless, undisputed, that equity has complete jurisdiction to prevent a multiplicity of suits.

Multiplicity of Suits.

In one of the suits in which the orders appealed from were entered, there are involved 44 placer mining claims and in the other 12 placer mining claims. If the appellants herein had not been enjoined and had filed copies of their notices of forfeiture and affidavits of service, they would thus create a *prima facie* case of failure on the part of complainants to contribute their shares of the assessment work. Under the Statutes of the United States, Section 2324, R. S. U. S., such failure would cause a forfeiture of the rights of the respective complainants. This would authorize the defendants to immediately sell and convey all, or any, of the rights of the respective complainants to third persons. Such conveyances might be many hundred in number. They could convey one claim, or any fraction of any one claim, to any one party, and if that party's deed was recorded, it would require *innumerable* suits in equity on the part of complainants to remove the cloud upon their titles thus imposed. (We are not unmindful of the rule of *lis pendens* announced by the appellants in their brief, but will consider the authorities cited by them later on in this brief.)

We again refer to the case of McConnaughy v. Pennoyer, 43 Fed. 339, in which the Court says:

> "The defendants are not now authorized to dispose of swamp land in larger quantities than 320 acres to any one person, and that may be sold outright, and a conveyance made to the purchaser at once. The disposition of this large tract of land in this manner may involve at least 150 sales, to as many different persons. If such sales are allowed to be made, the plaintiff will be compelled, in the assertion and maintenance of his right, to bring a separate suit in equity against each of such purchasers, to quiet title or to charge him as a trustee of the legal title for the benefit of the plaintiff, the owner of the equitable estate.
>
> "This presents a very strong case of a multiplicity of suits, that may be prevented by this suit, in which the whole matter may be considered and determined at once, and thus save expense and delay to all persons concerned."

It must be remembered that this case was appealed to the Supreme Court and affirmed in 140 U. S. Rep. p. 1.

We, therefore, submit that the Court would be justified in granting the injunction to prevent multiplicity of suits, and to issue the injunction complained of in aid of that jurisdiction.

Complainants Are Entitled to an Accounting.

There is still a further ground upon which the jurisdiction may be rested and that is, the respective complainants allege that they are not informed and

cannot ascertain how much, if any, money the defendant Pack expended in the representation of said placer claims, and ask that the defendant Pack account in these actions to the Court, and the respective complainants, for all moneys which he claims to have spent, and that the respective complainants will, when said accounting is had, and such showing made, pay whatever amount the Court finds that Pack has expended in the representations of these placer claims.

This Court has jurisdiction of these cases for this purpose, as well as others, and in order to retain the *status quo,* has full authority to enjoin the defendants from interfering with, or doing any act, which would change the situation of the parties or their rights to the property.

Comparative Injury to Respective Parties.

Counsel insists that the Court should consider the comparative injury of both parties in determining whether or not an injunction should issue, and says: "Such a comparison is one of the most satisfactory tests available to determine whether or not an injunction should be granted or maintained in force and should always be applied."

In their comparison, however, they seem to overlook the fact that the forfeiture claimed by them does not arise, and is not perfected, by the filing of the copies of the Notices of Forfeiture, together with affidavits of service thereof, and seem to take the position that if they are not allowed to file such

Notices and Affidavits within ninety days after the service of the Notice, all their rights under the Notice cease and become inoperative. They take this position because of the provisions contained in Section 1426 of the C. C. of Cal. It must be remembered that this section does not provide for the forfeiture of any rights, but only provides for the filing of a copy of the Notice of Forfeiture, together with an affidavit of service, in order that there may be some record of the action of those who seek a forfeiture under the Statutes of the U. S. The filing of the Notice and Affidavits does not *work a forfeiture.* That is done by the provisions of the Acts of Congress. A forfeiture may, therefore, be complete if no copies of affidavit are filed. Apparently, the only objects to be gained by the filing of the Notice of Affidavit are to creat a *prima facie* case in favor of forfeiture, and have placed upon the records of the county in which the locations sought to be forfeited, are situated, a record of the proceedings. If the Notices of Forfeiture were served upon the proper parties, and are correct in form and true in fact, then all the rights of such parties in and to the locations, become forfeited at the expiration of ninety days from the service. Therefore, the only injury to the appellants, by the injunction, is to delay the operation of the forfeiture given by the Acts of Congress, until an investigation can be made by the Court and a determination had as to whether or not forfeiture may be claimed. None of their *rights* are affected, but they are merely delayed

until the Court determines whether they have any rights at all.

Counsel are clearly in error when they insist that unless "copies of the Notices and the Affidavits of service are filed within ninety days, they will be deprived of their right of forfeiture." We have seen that they would not be deprived of their right of forfeiture, if they had such right. ~~The only deposi-~~ ~~forfeiture, if they had such right. The only depriva-~~ ~~as *prima facie* evidence in their favor.~~ They could always make the proof of the service of the Notices of Forfeiture by the testimony of the parties who served them, or if necessary to protect them against the death or removal of such parties, they might either procure an affidavit of service, or take testimony *de bene esse* under the Statutes of the U. S. Aside from all this, all that the defendants would need to do would be to obtain a certified copy of the respective complaints filed by the complainants in the District Court of the U. S., for the Southern District of California, wherein it is alleged, under oath, that the service of the Notices was made in September, 1914, and a copy of the Notice is attached to the complaint. No possible injury could result to the defendants from the injunction.

But, again, if they were enjoined by any party from filing copies of the Notices and Affidavits of Service, such party would be clearly estopped from ever asserting that the same were not filed within the proper time. Their failure to file would have been caused by the act of the opposing party in

obtaining an injunction and, therefore, such party would be estopped from even raising or contesting the question as to whether or not they were filed in time.

Denials of Allegations of Complaints.

Counsel seem to claim that inasmuch as some of the allegations of the complaint are denied by the affidavits, they overcome the *prima facie* case made by the complaints and the injunction should have been dissolved. They cite numerous authorities to sustain this position, but they fail to distinguish the principles there laid down, in their application to the case at bar.

The rule that a denial of the equities of the complaint will dissolve an injunction, is one that is seldom, if ever, applied under the present practice, and where it is, the answer or affidavits must contradict *all the material allegations,* and *all the equities* of the complaint. The mere denial of the truth of one allegation in the complaint simply raises an issue as to that allegation, and the resultant decision is necessary before it can be ascertained which of the parties is correct. A case in equity is not tried on complaints and answers and affidavits alone, but upon the issues as formed by them and other evidence introduced in the trial of the case.

The Court will notice in examining the authorities cited by counsel in their brief, that in each and all of them the principle is stated that *all the equi-*

ties and important allegations of the bill must be denied before the rule stated will be enforced. A great many of the allegations and equities of the bill in these cases are not even referred to in the affidavits. Indeed, a denial of such allegations would oust the appellants from any rights in the case. It is positively alleged in the bill, positively verified and not denied in any of the affidavits, for instance, that the complainants in these respective suits, and others, jointly located placer claims in 1910; that each of the plaintiffs is the owner of a one-eighth interest therein; that the defendants served upon them, respectively, in September, 1914, Notices claiming a forfeiture of complainants' interest unless payment was made within ninety days, of the sums demanded in the Notice. None of these allegations are referred to in the affidavits, or in any manner denied.

The complaints also allege that it is impossible to ascertain from the Notices the purposes for which defendant Pack claims to have expended the money stated in the Notices. The affidavit of Mr. Pack does not contradict this allegation and does not seek to explain his Notice of Forfeiture so as to show the inapplicability of the allegations above mentioned.

On page 64 of the record Pack alleges that during the year 1912, he did pay out the sum of $4,400 *"in connection with and for the purpose of procuring or performing the annual labor upon such 44 placer mining claims hereinbefore referred to and*

more fully described in the bill of complaint on file herein, which sum affiant believes should be properly charged against and constitute a part of the value of the annual assessment work for the year 1912, *and which sum affiant believes should be paid or contributed to him by his said co-locators, and that complainants should reimburse affiant for one-eighth of said sum.*"

Pack then denies the conspiracy; denies that the moneys, for which certain suits were brought, as alleged in the complaint, are to be applied upon the representation; denies that $2,836 should be applied upon the representation, and alleges upon information and belief that complainants are financially irresponsible "and unable to pay his or any portion of the money expended in doing assessment work on said claims during the year 1912." The affidavit of Schuler is entirely with reference to the Schuler deeds to Schellito and Hutchinson, except that she denies the conspiracy, or any part therein; the affidavit of Hutchinson deals largely with his transaction in procuring the Schuler deed; denies that anything was done by him in conspiracy with the two Tronas Companies and the Foreign Mines Company.

In addition to this, we find in each affidavit an allegation that complainants have a plain, speedy and adequate remedy at law by payment of their proportion of the assessment and demanding and procuring a recordation of a receipt of such payment, and the further allegation that affiant is ir-

reparably injured by complainants' neglect and refusal to pay their proportion of the sums stated in the Notices of Forfeiture within ninety days after the service.

These affidavits are very crude and imperfect, although very skillfully drawn and evidently prepared for the purpose of raising questions and issues upon which none of the affiants desire to make any absolutely positive statement.

Purpose of Injunction to Retain Status Quo.

The main purpose of an injunction *pendente lite* is to hold everything in *statu quo,* until a final determination of the suits, so that the Court may, upon entering its decree, do justice between all the parties. In many of the cases cited by counsel for appellants in their brief, it will be noticed that the injunction was refused because it *destroyed* the *status quo,* and in practically each and every case the doctrine is recognized that an injunction will be granted if necessary to retain the *status quo,* that is, retain the facts and the situations of each of the litigants in the exact condition they existed at the time of the filing of the complaint, until the final hearing. This is all we ask in this case. If the appellants had been allowed to file for record copies of the Notices of Forfeiture and affidavits of service, the *status quo,* at the time of the commencement of the suit, would be disturbed and changed. If, upon the final hearing of this case, it is decreed that complainants are indebted to Pack or Hutchinson for any moneys

properly expended by Pack in the representation of the claims described in the bill of complaint, the decree will require payment, by the respective complainants, of their respective shares of such amount of money, and upon default thereof, the Court, by its decree, will declare that their rights are forfeited. Such forfeiture will be more complete and perfect than could be acquired by the mere filing and recording of a copy of the Notice of proof of service. It will be made by decree of a Court of competent jurisdiction and end all litigation in regard to the matter.

It will be noticed that the effort and determination of Judge Bledsoe was to hold the situation in *statu quo* until the final determination of the suit. He indicated his fairness in this regard upon the hearing of the motions to dissolve the injunctions *pendente lite* by restraining the respective complainants from disposing of, encumbering or alienating any of the property described in the complaints until the final determination of the suits. In other words, he made the injunctions reciprocal to which there can be no objection by anyone. (R. p. 85.)

Effect of Doctrine of Lis Pendens.

Counsel assert with much vehemence that by the filing of the complaints, notice was given to the world of the contest involved, and all parties dealing with the title to the property would be bound by the decree and, therefore, no injunction was necessary. They have attempted to support this position

by the citation of some authorities, but an examination of the cases cited disclose that in none of them the conditions presented here were involved. If the pendency of the suits should have satisfied and protected the complainants, how can the appellants be injured by the injunction? But the pendency of the suits would not have protected the plaintiffs to the extent they were entitled, and such protection is given by the injunction. The obvious purpose of the defendants was to file with the County Recorder under Section 1426, C. C. C., the copies of the Notices of Forfeiture and the affidavits of service. By such filing, as we have already seen, a cloud would be cast upon the title of complainants, which would have to be removed in order to make their title clear; in fact, without the injunction against the filing of such papers, the legal effect of the action sought to be enjoined would have been complete. The titles of the complainants would have at least, *prima facie*, passed to the appellants and they would have had the right to deal with the property in any way they pleased.

Even though the pendency of the suit might have been sufficient, it is no reason for dissolving the injunction. The Court below, when it granted the injunction, had the right to give that sort of relief, and there is nothing in the record to show that the lower Court's attention was called to the doctrine of *lis pendens*, or that the same was presented to him or considered by him.

Verification of the Complaints.

Great stress is also laid upon the fact that the complaints are not verified by the complainants themselves, but by one Henry E. Lee. We know of no rule requiring a complaint to be verified by the complainant, if the facts stated in the complaint are sworn to by some person who is acquainted with them. We find nothing in the equity rules of the Supreme Court of the U. S. or in the decisions, to the contrary.

Besides the Court below had no opportunity of passing upon this proposition. It was not even suggested to the Court below, and appellants should be held estopped from raising the question here for the first time.

Conclusion.

We submit that this Court will not hear and determine these appeals as though they were up for final adjudication. The injunctions were merely the result of interlocutory orders based upon the complaint and affidavits, and the Court should not enter into the merits of the case, but only determine whether or not the Court below in granting the injunction abused its discretion, fully lodged in that Court; neither is this the proper time or the proper proceeding for the consideration and determination by this Court of any defect in the method of making the allegations of the complaint or the sufficiency thereof, if the complaint contains positive allegations

properly pleaded sufficient to warrant the Court below in exercising its judicial discretion to grant the injunctions. The correctness of the complaint should be arrived at upon proper motions in the Court below, if the appellants believe that it needs correction.

We submit that the orders appealed from should be affirmed with costs.

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